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403. The "salutary rule" of relieving the judge from the "very delicate and trying duty of deciding upon the question of his own disqualification" received the warm approval of the California court in the case last cited.

The *Berger* case effectually disaffirms the doctrine of *Ex parte N. K. Fairbanks Co.*, 194 Fed. 978, where Judge Jones, in the Middle District of Alabama, held, in a long and elaborate opinion, that Congress could not, under the Constitution, "lawfully enact that a judge, who is in truth qualified, is in law disqualified because a suitor makes an affidavit to that effect, and make that *ex parte* statement conclusive proof of the disqualification and cut off all judicial inquiry as to the judge's competency." He contended that the disqualification of a judge to try a particular case must rest upon facts which unfit him, and the existence of such facts must be determined as a judicial question by some judicial tribunal; that if the filing of the requisite affidavit operated to prevent the judge from further acting in the litigation we should have a situation where "the affidavit maker in fact, though not in name, puts on the judicial robes and excludes the presiding judge and all other judicial authority from any voice in determining the matter, and by the mere filing of an affidavit renders judgment of disqualification and executes it," citing *Mabry* v. *Baxter*, 11 Heisk. (Tenn.) 689, 691, and *Sanders* v. *Cabanniss*, 43 Ala. 173, in condemnation of such a procedure as an illegal assumption by the legislature of judicial power.

Although two dissenting opinions were filed in the *Berger* case, written by Justices Day and McReynolds, neither of them suggests that the construction of the statute given by the majority of the court involves any unconstitutional interference with the judicial power vested in the courts.

E. R. S.

ACCIDENT IN WORKMEN'S COMPENSATION.—The interpretation of workmen's compensation statutes has caused the courts a great deal of difficulty. The usual statute provides for compensation for an "accident arising out of and in the course of the employment." Such a type of statute has made it necessary for the courts to inquire into what constitutes an accident, what is an accident arising out of the employment, and what is an accident arising in the course of the employment. Each one of these inquiries has been the source of much litigation, and it has now become fairly well settled as to what accident "arises out of and in the course of the employment." See 12 MICH. L. REV. 614, 688; 14 MICH. L. REV. 525; 15 MICH. L. REV. 92, 606; 16 MICH. L. REV. 179, 462; 18 MICH. L. REV. 72, 162. The question as to what constitutes an accident is still the subject of many varied decisions. The problem was involved in the recent case of *Prouse* v. *Industrial Commission* (Colo., 1920), 194 Pac. 625, where the court (two judges dissenting) held that a coal miner was not injured by accident where a germ disease had proved fatal because he had become weakened by foul air and dioxide gas which came from an inclosed entry that the miners had broken into.

One of the principal reasons for the variety of decisions in regard to the word "accident" is that the word is used in many different senses, and

there are times when a liberal interpretation is called for and others where a strict construction is demanded. The courts, in interpreting accident insurance policies, generally hold that if the death is caused by a previously diseased condition of the body, without which the death would not have followed the injury, it is not an accidental death. *National Masonic Assn.* v. *Shyrock,* 73 Fed. 774. In workmen's compensation cases, however, it is generally held that anything contributing directly or indirectly to incapacity following an injury is sufficient within the compensation laws. *Indian Creek Mining Co.* v. *Calvert,* 119 N. E. (Ind. App.) 519; *Robbins* v. *Gas Engine Co.,* 191 Mich. 122.

A disease contracted by gradual process, commonly known as an industrial or occupational disease, is not an accident within the compensation laws. *Liondale Bleach, Dye and Paint Works* v. *Riker,* 85 N. J. L. 426; *Adams* v. *Acme White Lead and Color Works,* 182 Mich. 157; *Paton* v. *Dixon,* [1913] 6 B. W. C. C. 882; *Evans* v. *Wood,* [1912] 5 B. W. C. C. 305. The usual reasoning of the courts is that an accident must have definite time, place, and circumstances. Other courts take the view that the important characteristics of an accident are that the injury be unexpected and unintentional. *Fidelity and Casualty Co.* v. *Commission,* 177 Cal. 614; *Indian Creek Mining Co.* v. *Calvert, supra.* These two lines of reasoning show that the courts which adhere to the first view adopt the layman's interpretation of an accident, while the others have used the word in a special legal sense. Under either line of reasoning, a man slowly acquiring lead poisoning while working in a mine is not injured by accident; but should there be a caving-in of a wall which held back poisonous fumes, and the workman should, as a consequence, acquire lead poisoning suddenly, there would be an injury by accident.

The situation of the English law is, at present, in this position. Where a workman gradually contracted eczema while employed at dipping rings in a chemical, it was held not to be an accident. *Evans* v. *Wood, supra.* But recovery was allowed in *Alloa Coal Co.* v. *Drylie,* [1913] Sess. Cases 549, where a water pump burst and the workman died from pneumonia (a germ disease) contracted from standing in the cold water. In the case last cited, Lord Dundas delivering the majority opinion, said that the disease was attributable to some particular event or occurrence of an unusual and unexpected character incidental to the employment, and could fairly be termed an accident. Lord Salverson, rendering a dissent in the same case, said that if the deceased's legs had become inflamed from standing in the cold water, or if the water had been corrosive in its character, there would have been an injury by accident. This English case and the recent Colorado case are similar in that the workman in each case died from a germ disease resulting from his weakened condition. The cases are, however, by no means analogous and the facts are sufficiently different to warrant opposite results. Poor air in a mine is to be expected, but the bursting of a water pipe is unexpected; and if the English court were to decide the Colorado case and were to apply the reasoning used in the *Alloa Coal Co.* case, it would in all

probability reach the same conclusion that the majority reached in the Colorado case.

The situation in the Wisconsin court is much the same as that in England. In *Vennen* v. *New Dells Lumber Co.*, 161 Wis. 370, it was held that a laborer contracting typhoid fever by drinking impure water was injured by accident because the affliction was attributed to the undesigned and unexpected presence of bacteria in the drinking water. The principal difference between the majority and the dissenting opinions seems to be that the latter emphasized the fact that no external violence occurred. The Wisconsin Industrial Commission has held that a gradually acquired occupational disease is not an accidental injury within the meaning of the act. *Derkindern* v. *Rundle Mfg. Co.*, Rep. Wis. Indus. Comm. (1914-15) 16.

The California court expressed the reason for the many conflicting views on the subject when it said that in workmen's compensation cases it gave the phrase "sustained by accident" a broad construction in harmony with the spirit of liberality in which the statute was conceived. *Fidelity Co.* v. *Commission*, 177 Cal. 614. This spirit of liberality is described in *Ross* v. *Erickson*, 89 Wash. 634, where the court said that injustice to the laborer and hardships to the industries of the state alike called for some plan that would relieve the servant of the necessity of pursuing his remedy in the courts and subjecting himself to all the harassments, vexations, and uncertainties attending a trial. The laws are designed to protect the workman, but the courts will not allow them to be used to mulct the employer and the public. It is for this reason that vocational diseases are not included within the statutes, because the cause of the injury is not traceable with reasonable certainty by any reliable method of proof. To allow such speculative claims would be to encourage fraudulent practices and would contribute to defeating the broad purposes underlying the compensation laws. The question whether the cause of the injury is traceable by any reliable method of proof should, therefore, determine whether recovery should be allowed under the "sustained by accident" clause. It is by this test that it must be decided whether an unexpected and unintentional injury constitutes an accident or whether actual physical violence is necessary. See 14 COL. L. REV. 563, 648. C. G. B.

LICENSES—ORDINANCE AUTHORIZING COMMISSIONER TO REVOKE SOFT DRINK LICENSE INVALID.—The city of Tacoma passed an ordinance creating a license department in the department of public safety, which provided for licensing and regulating soft drink and candy stores. The ordinance arranged for the means of securing such a license and then enacted: "The license of any business mentioned in this section may be revoked by the commissioner of public safety in his discretion for disorderly or immoral conduct or gambling on the premises, or whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary. Such revocation shall be subject to appeal to the city council, to be prosecuted by filing a written notice with the council within